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No. 80-424

In the Supreme Court of the United States

October Term, 1980

J. R. RUSSELL, *Petitioner,*

vs.

STATE OF KANSAS, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

ROGER N. WALTER
(Counsel of Record)
Disciplinary Counsel
Office of the
Disciplinary Administrator
Room 278 - Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2486
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

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COMES NOW, the Respondent by and through their counsel, Roger N. Walter, Disciplinary Counsel for the State of Kansas, and for their response to the submitted Petition for a Writ of Certiorari present the following brief in opposition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts those provisions cited by Petitioner, but objects to the partial citation of K.S.A. 7-111. In whole, K.S.A. 7-111 provides:

> "An attorney-at-law may be disbarred or disciplined by the supreme court, for any of the following causes arising after admission to practice in this state: 1. For willful disobedience of an order of court requiring the attorney to do or forbear an act connected with or in the course of his or her profession. 2. *For a willful violation of the attorney's oath,*

or of any duty imposed upon an attorney-at-law. 3. For neglecting or refusing, on demand, to pay over money in his or her hands, due or belonging to a client, except where such money is retained under a bona fide claim of a lien for services. 4. For destroying, secreting, fraudulently withdrawing, mutilating, or altering any paper or record belonging to the files or records in any action or proceeding." [Emphasis supplied.]

Respondent further submits the following Rule of the Kansas Supreme Court relevant to this petition.

KANSAS SUPREME COURT RULES RELATING TO THE DISCIPLINE OF ATTORNEYS

RULE 202
GROUNDS FOR DISCIPLINE

"The license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally in conformity with the standards imposed upon members of the bar as conditions for the privilege of practicing law. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office as set forth in Rule 702(h), or the Code of Professional Responsibility as set forth in Rule 225 hereof, or as hereinafter amended, shall constitute misconduct and shall be grounds for discipline, *whether or not the acts or omissions occurred in the course of an attorney-client relationship.*

A certificate of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against said attorney based upon the conviction." [Emphasis supplied.]

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner's statement of the case is accurate, but Respondent would offer some additional facts relevant to the question presented.

The complaint filed against the Petitioner surrounds a political advertisement placed in the Sunday edition of the *Kansan* newspaper, January 21, 1979, which the Petitioner caused to be published in support of his candidacy for the Kansas City, Kansas Board of Public Utilities (B.P.U.). [Petitioner's Appendix D] In that advertisement the Petitioner made several allegations about Nick Tomasic, District Attorney for Wyandotte County, Kansas, and Paul A. Haas, an incumbent member of the B.P.U. running for reelection.

Tomasic and Haas filed complaints against Russell with the Disciplinary Administrator, an official charged with overseeing the attorney disciplinary procedures in the State of Kansas. Ultimately a formal complaint was issued alleging the Petitioner caused the aforementioned advertisement to be published, that the advertisement contained false, misleading and deceptive statements, and that the Petitioner knew or should have known this to be the case. [Appendix A]

The complaint filed against the Petitioner, J. R. Russell, was referred for formal hearing pursuant to Kansas Supreme Court Rules Relating to Discipline of Attorneys

(hereafter referred to as Rules), Rule 211. [Appendix B] A hearing panel was appointed and formal proceedings conducted. A report of the Hearing Panel was issued making certain findings of fact and recommending that the Petitioner be disciplined by public censure. (Petition for Certiorari, Appendix C) Thereafter, pursuant to Rule 212 (Appendix C), the matter was submitted to the Kansas Supreme Court for consideration. Petitioner filed exceptions to panel findings and recommendations, both parties filed briefs, and the matter was argued on the merits before the Kansas Supreme Court. Kansas Supreme Court's decision is supplied in *State v. Russell,* 227 Kan. 897, ... P.2d ..... (1980).

The Petitioner listed five factual statements in the advertisement. (Petitioner's Appendix D) The allegations charged misconduct, various illegal acts, and violations of law by the incumbent member of the Board of Public Utilities and the district attorney of Wyandotte County. Considering the findings of fact of the hearing panel, the Kansas Supreme Court held that Russell made false statements in the ad which he knew or should have known to be false—*State v. Russell, supra,* 227 Kan. at 904. (Petitioner's Appendix A, A10-A12) Moreover, the court concluded that the petitioner was guilty of intentionally publishing known falsehoods to gain personal advantage, thereby engaging in conduct involving dishonesty and misrepresentation. *Id.* (Petitioner's Appendix A12)

B. How Federal Question Arose

Petitioner contends that the Kansas Supreme Court order of public censure, violated his rights of freedom of expression under the First Amendment to the United States Constitution.

REASONS FOR NOT GRANTING CERTIORARI

I. Petitioner's Allegations Do Not Raise Novel Questions Of Constitutional Concern, And The State Court's Decision Is In Accord With Established Federal Precedent.

Petitioner claims his request for review presents a novel question of constitutional law which has not been considered by this court, but should be. The petitioner also implies that the decision of the state court in this matter runs contrary to established federal precedent. Respondent disagrees.

An examination of the facts pertinent to this petition as well as the state court decision on which this petition was filed, reveals that the petitioner raised his First Amendment objection throughout the state disciplinary proceedings. This claim was thoroughly considered by the Kansas Supreme Court, and their opinion, *State v. Russell, supra* (Petitioner's Appendix A), presents an exhaustive analysis of an attorney's First Amendment right to free speech versus his professional obligation to speak the truth. Respondent submits the opinion is straightforward, well reasoned, and in accordance with established federal precedent on the First Amendment issue presented.

The Petitioner contends the state court in its decision noted "little authority can be found on issue of professional discipline for political rhetoric directly implicating dishonesty under DR 1-102(A)(4). [Petition, p. 5] The complete text of the passage from which that quote is extracted reads as follows:

> "Respondent [Petitioner herein] notes that little authority can be found on the issue of professional discipline for political rhetoric directly implicating dis-

honesty under DR 1-102(A)(4). However, extensive treatment is afforded the issues of discipline of attorneys for publications made in the course of political campaigns for the election of judges. See annotations in 57 A.L.R.2d 1362 and 12 A.L.R.3d 1408. An attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness. *In re Charles A. Thatcher,* 80 Ohio St. 492, 89 N.E. 39 (1909). Within that context the expression of opinion is protected if true or in good faith believed to be true, but when derogatory factual allegations are false and with ordinary care should have been known to be false, discipline may be imposed. *State Board of Exam. v. Spriggs,* 61 Wyo. 70, 155 P.2d 285 (1945)." *State v. Russell, supra* at 901. (Petitioner's Appendix A8)

As that opinion notes abundant authority is found on the question of professional discipline for publications made by attorneys in the course of political campaigns for judicial elections. See 12 A.L.R.3d 1408. In that context unfounded adverse criticisms carried beyond the bounds of truth and fairness raise the related issue of conduct prejudicial to the administration of justice DR 1-102(5). Differences between this line of precedent and the facts presented by the Petitioner's case are not significant for purposes of resolving conflict between proper regulation of ethical conduct of attorneys and freedom of expression.

Such precedent holds that an attorney's remarks in that political forum may be disciplined if carried beyond the limits of truth and fairness, *In re Thatcher,* 80 Ohio St. 492, 89 N.E. 39 (1909); and overall an attorney's right to free speech is tempered by his professional obligation to speak the truth. *State v. Nelson,* 210 Kan. 637, 504

P.2d 211 (1972). This line of precedent is analogous and appropriate to the context of the petitioner's case.

This Court has previously spoken to underlying issue presented by the Petitioner's claim. *In re Sawyer,* 360 U.S. 622, 3 L. Ed. 2d 1473 (1959). The concurring opinion of Justice Stewart notes;

> "If as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven ethical misconduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech . . . ." 360 U.S. at 646-47.

Further, an examination of federal precedent reveals a U.S. District Court opinion squarely addressing the issue of conflict arising from proposed attorney discipline for professional misconduct under Canon 1 (Canons of Professional Ethics) and First Amendment freedom of expression. *Polk v. State Bar of Texas,* 374 F. Supp. 784 (1974). Citing *Konisberg v. State Bar of California,* 360 U.S. 36 (1960); *Spevack v. Klein,* 385 U.S. 511 (1967), and *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963), the court noted:

> ". . . In substance, these decisions have held that only in those instances where misconduct threatens *a significant state interest* can a state restrict an attorney's exercise of his rights under the constitution.

> Generally there are two areas where a state has a significant state interest in prescribing standards of attorney conduct. An attorney may be disciplined for conduct which shows his inability to represent clients competently and honestly. An attorney may also be disciplined for conduct which interferes with the process of the administration of justice . . . ." 374 F. Supp. 787-88. [Emphasis supplied.]

The state court in reviewing this matter found that the petitioner had engaged in conduct involving dishonesty and misrepresentation *State v. Russell, supra,* 227 Kan. at 904 (Petitioner's Appendix, A12), and that this raises a question as to an attorney's ability to represent client's competently and honestly, an area of attorney conduct in which the state has a significant interest in prescribing and enforcing standards. *Id.*

II. State Court Rules Legitimately Subject A Licensed Attorney To Discipline For Improper Conduct In Relation To Individual Or Personal Activities.

Respondent would argue that the authority to regulate and prescribe standards for attorney conduct is an inherent responsibility of the judicial branch of government in conducting its own affairs and controlling its officers. *Ex parte Bradley,* 74 U.S. 364 (1869). This authority does not proceed from a legislative grant of authority and does not require enabling legislation. The absence of statute specifying grounds for discipline does not prevent the discipline of an attorney for good cause. *Ex parte Secombe,* 60 U.S. 9 (1856). Furthermore, the enactment of legislation providing for suspension or disbarment on certain specified grounds, does not limit the common-law power of the court, and attorney may nevertheless be disciplined for causes other than those mentioned. *Stratmore v. State*

Bar of California, 14 Cal. 3d 887, 538 P.2d 229 (1975). *See also,* 92 A.L.R.3d 803.

Thus K.S.A. 7-111 does not limit the authority of the state court in disciplining the Petitioner. Notwithstanding, K.S.A. 7-111 provides in pertinent part that an attorney may be disciplined for a number of causes, including:

> ". . . 2. For a willful violation of the attorney's oath, or of any duty imposed upon an attorney-at-law . . . ."

The Rules of the Kansas Supreme Court Relating to Discipline of Attorneys, Rule 202 GROUNDS FOR DISCIPLINE provide in part:

> ". . . Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office as set forth in Rule 702(h), or the Code of Professional Responsibility as set forth in Rule 225 hereof, or as hereinafter amended, shall constitute misconduct and shall be grounds for discipline, *whether or not the acts or omissions occurred in the course of an attorney-client relationship. . . .*" [Emphasis supplied.]

Under Rule 202, a Kansas attorney is bound by the applicable disciplinary rules of the Code of Professional Responsibility whether acting in a personal or professional capacity. This is in accord with the generally accepted interpretation of the Code in most jurisdictions. See Formal Opinion 336, Committee on Ethics and Professional Responsibility of the American Bar Association, June 3, 1974. Rule 202 is within the grounds for discipline as specified in K.S.A. 7-111. However, even it were not, the Rule is nevertheless valid and a legitimate exercise of the court's inherent judicial authority in prescribing standards for attorney conduct.

III. Petitioner's Claim That He Has Been Denied Equal Protection Of The Law Is Frivolous And Without Merit.

Petitioner's third argument in support of granting his petition for review is that it violates equal protection of laws to impose discipline on a licensed attorney, for publishing false allegations, in circumstances where his statements may have not been libelous within the "actual malice" rule announced in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Petitioner does not cite any cases in support of this construction of the equal protection clause. Indeed, such an argument is not supportable in law and is clearly without merit.

Malice was never an issue in the hearing panel's or the court's deliberations on the Petitioner's discipline. The substantive law of defamation is not germane to considerations of an original proceeding in discipline, which under Kansas law is neither a civil nor criminal proceeding but a species unto itself. *State v. Holmes,* 218 Kan. 537, 545 P.2d 343 (1971). The question of whether the civil law will compensate for personal injury is something entirely different from whether an attorney has breached his professional ethics. Whether a libel action would lie on the stated facts is of no consequence to considerations of attorney discipline.

IV. The State Court Decision Does Not Limit Rights Under The First Amendment.

Petitioner's fourth argument in support of his petition intimates that the state court decision relies on an interpretation of Section 11 of the Kansas Bill of Rights, which qualifies or limits the right of free speech guaranteed under First Amendment to the United States Constitution. This is not the case. Kansas decisional law has consistently recognized that rights afforded under the First Amendment

are coextensive with rights provided by Section 11 of the Kansas Bill of Rights. *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 72, 547 P.2d 760 (1976). *State v. Russell, supra,* at 899-900. (Petitioner's Appendix A6) The state court's assessment of the Petitioner's First Amendment claim evaluated with adequate regard for the U.S. Constitution and federal decision interpreting the scope of the First Amendment. (See Argument I *supra*)

V. Discipline Of The Petitioner Implicates A Significant State Interest.

The issue squarely before the state court in deliberating the proposed discipline of the petitioner, framed in light of the precedent of *Polk v. State Bar of Texas, supra,* was whether the Petitioner's misconduct threatened a significant state interest. The *Polk* decision alludes to two areas where such an interest exists. The category here implicated is "conduct which shows his [an attorney's] inability to represent clients competently and honestly . . . ." *Polk, supra* at 788.

The misconduct questioned in the state proceedings was the publication of a number of false, deceptive, and misleading statements regarding two individuals in a newspaper political advertisement which Respondent knew or should have known to be false. After fully hearing the evidence, the Hearing Panel concluded that numerous facts represented in the ad were false, and that the tenor of the allegations was false and misleading. The state court affirmed this finding on review. One need only review each allegation as presented in Petitioner's Appendix D to appreciate the deceptive innuendo created by design in each derogatory allegation. The aspersions cast upon the reputations of Mr. Tomasic and Mr. Haas were not slight. They in no subtle way implied that Mr. Haas and Mr. Tomasic were guilty of crimes, public misconduct, and

on occasions conspired to suppress the prosecution of major felonies involving embezzlement of public funds.

The circumstances of each and every misrepresentation of facts or misleading innuendo found by the Panel Report (Petitioner's Appendix D) clearly supports the conclusion that the Respondent either knew the factual allegations to be false, or should have known them to be false. The Panel Report also recognizes that the Respondent's conduct though within the political arena, was premised on a long history of personal animosity between him and Tomasic.

The misrepresentation of facts and unfounded allegations in a newspaper advertisement, designed to mislead the general public, and attack the good name and reputation of another is reprehensible in its own right, but when pursued by an attorney bound to a higher standard of professional and personal conduct it belies the respect and confidence of the bar and the society which he serves. Under the Code of Professional Responsibility a lawyer has the following responsibility:

"DR 1-102 Misconduct

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . .

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Throughout its many decisions, the Kansas Supreme Court has consistently placed high regard on attorney's obligation to speak and act honestly. *See, In re Macy,* 109 Kan. 1 (1921); *State v. Zeigler,* 217 Kan. 748, 538 P.2d 643 (1975); *State v. Martindale,* 215 Kan. 667, 527 P.2d 703 (1974). In the *Zeigler* decision the court noted:

> "The desired confidence and faith of clients in members of the legal profession can only be obtained by a strict adherence to the adopted code. Lawyers should accept as a part of their professional life an elevated standard of conduct not required by most of their non-lawyer associates. The responsibilities of the profession require, '. . . there must be exacted those qualities of truthspeaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character"' (Concurring opinion by Mr. Justice Frankfurter, in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247, 1 L. Ed. 2d 796, 77 S. Ct. 752.)" *Id.* at 754-755.

Though an attorney does not sacrifice his right of political expression in fair comment and criticism of public officials, this Court has made it abundantly clear that an attorney has an obligation to speak the truth. For an attorney to fail to abide strictly by his personal and professional responsibility to conduct his affairs free from deceit and misrepresentation is to call into question his ability to serve his clients and profession in an honest and competent manner. The State retains a significant interest in sanctioning the Respondent's conduct in knowingly misrepresenting facts or recklessly disregarding their accuracy.

Respectfully submitted,

ROGER N. WALTER
(Counsel of Record)
Disciplinary Counsel
Office of the
Disciplinary Administrator
Room 278 - Kansas Judicial Center
Topeka, Kansas 66612
(913) 296-2486
Attorney for Respondent

APPENDIX

APPENDIX A

TO: Secretary of Kansas Board for
Discipline of Attorneys

No. W1471

NICK A. TOMASIC,
Complainant

J. R. RUSSELL,
Respondent

No. W1464

PAUL A. HAAS,
Complainant

J. R. RUSSELL,
Respondent

FORMAL COMPLAINT

Comes now Arno Windscheffel as Disciplinary Administrator, under the authority granted under Supreme Court Rule 211 (b), and for his complaint against Mr. J. R. Russell, alleges and states: J. R. Russell is an Attorney at Law; that his last registration address with the Clerk of the Supreme Court of Kansas is 430 Brotherhood Bank Building, Kansas City, Kansas 66101.

1.) In January, 1979, respondent was a candidate of the Board of Public Utilities of Kansas City, Kansas. That as part of his campaign he ran a series of newspaper ads which contained false, misleading and deceptive statements.

PREVIOUS PAGE WAS BLANK

2.) On or about January 14, 1979, the respondent caused a political advertisement to be run in the Daily Kansan a newspaper published in the Kansas City, Kansas area. The newspaper ad stated, in part:

> "NEXT WEEK: #4 SOME FACTS, SOME RECORDS, SOME DOCUMENTS FOR OUR FAVORITE WYANDOTTE COUNTY DISTRICT ATTORNEY ABOUT THE WATER & LIGHT DEPT. SHORTAGES, OUSTERS, AND EMBEZZELMENTS. $5,000 UNPAID WATER AND LIGHT BILLS."

3.) On or about January 21, 1979, the respondent caused another political advertisement to be run in the Daily Kansan. A copy of the ad is attached to this formal complaint.

4.) The ad contains numerous false, deceptive, and misleading statements which the respondent either knew or should have known to be false, deceptive and misleading.

a.) In Fact Statement No. 1, it is incorrectly stated that the District Attorney ousted two utility commissioners for acts of "nepotism." Quotes are used to give further weight to the incorrect statement when, if in fact, there is no quote. The statement gives the false and misleading impression that it is illegal for the District Attorney to have his nephew on his staff.

b.) In Fact No. 2, the respondent gives the misleading impression that the District Attorney refuses to prosecute persons guilty of embezzling over $200,000.00. It further gives the false impression that the District Attorney had a special interest or showed favoritism since he was a former employee of the bonding company involved.

c.) In Fact No. 4, respondent again makes false statements. He states, "No person can be retired from a public agency, collect a pension, a salary and fringe benefits all at the same time without a conflict of interest." He further states such a situation is not legally possible. Both of these statements are misleading and false. In 1975, respondent was plaintiff's attorney in a case where this very issue was decided adversely to respondent. The court found nothing illegal about the arrangement respondent describes. Respondent had full knowledge of the facts yet persisted in his insistence that it was illegal.

d.) In Fact No. 5, the respondent states the District Attorney had knowledge of certain illegal acts and refused to prosecute. The statement is false in that the District Attorney had no knowledge of any such violations.

The foregoing acts constitute the making of false, misleading and deceptive statements by the respondent in contravention of his attorney's oath and the Code of Professional Responsibility.

Dated this 18 day of April, 1979.

Signed: Arno Windscheffel
Arno Windscheffel
Disciplinary Administrator

Attachment not included

APPENDIX B

Rule 211
FORMAL HEARINGS

(a) Hearings shall be conducted by a panel of three attorneys, at least two of whom shall be members of the Disciplinary Board. Hearings may be held at any place in the state. The chairman of the Disciplinary Board shall designate the members of the panel, the presiding officer thereof, and the matters to be heard by the panel. The presiding officer shall be a member of the Disciplinary Board.

(b) Formal disciplinary proceedings shall be instituted by the Disciplinary Administrator by filing a complaint with the secretary of the Disciplinary Board. The complaint shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the complaint shall be served upon the respondent. The respondent shall serve an answer upon the Disciplinary Administrator within twenty days after the service of the complaint unless such time is extended by the Disciplinary Administrator or the hearing panel.

(c) Following the service of the answer, or upon respondent's failure to answer, the matter shall be set for hearing by the presiding officer of the panel.

(d) The Disciplinary Administrator shall serve a notice of hearing upon the respondent, respondent's counsel, and the complaining parties. The notice shall state that the respondent is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence. The notice shall also state the date and place of the hearing and shall be served at least fifteen days in advance of the hearing date. The hearing shall be governed by the

Rules of Evidence as set forth in the Code of Civil Procedure. (Art. 4, Ch. 60, Kansas Statutes Annotated.)

(e) All witnesses shall be sworn and all proceedings and testimony shall be recorded, either by stenographic means or by electronic recording.

(f) At the conclusion of a hearing held by a panel, a report shall be made to the Disciplinary Board setting forth findings and recommendations, which report shall be signed by a majority of the panel and submitted to the Board. To warrant a finding of misconduct the charges must be established by clear and convincing evidence.

A unanimous panel report shall be deemed a final hearing report and shall be filed, served and acted upon as hereinafter provided.

If a panel report is not unanimous, the report, findings and recommendations of the panel shall be reviewed by the Disciplinary Board, exclusive of members who acted on the matter as members of the review committee (see Rule 204 [e]). The Disciplinary Board shall act thereon and make its recommendations which, together with the panel report, shall constitute the final hearing report.

A copy of the final hearing report shall be mailed or delivered by the Disciplinary Administrator to the respondent and to counsel of record.

If the final hearing report does not recommend discipline the report shall be filed with the secretary of the Disciplinary Board and with the Disciplinary Administrator.

If the final hearing report recommends discipline of disbarment, suspension, or public censure, as prescribed by Rule 203(a)(1), (2) or (3), the report, findings and

recommendations of the panel and the Disciplinary Board, together with the complaint, answer and transcript, if any, shall be filed with the Clerk of the Appellate Courts and the matter shall proceed as provided by Rule 212.

[History: Am. May 8, effective July 1, 1978; Previously Rule No. 212, Am. effective January 8, 1979.]

APPENDIX C

Rule 212
PROCEEDINGS BEFORE THE SUPREME COURT

(a) All disciplinary proceedings filed in the Supreme Court shall be conducted in the name of the State of Kansas.

(b) Cases for hearing before the Supreme Court shall be filed with the Clerk of the Appellate Courts and shall contain a copy of the complaint and respondent's answer, together with fifteen copies of the panel's report and fifteen copies of the Disciplinary Board's recommendation, if any, thereupon, the matter shall be docketed by the Clerk as:

IN THE SUPREME COURT OF THE
STATE OF KANSAS

State of Kansas,	No.——
v.	Original Proceedings
Attorney, *Respondent.*	in Discipline

The complaint, answer, report, findings and recommendation of the hearing panel, recommendation of the Disciplinary Board, if any, and transcript, if any, shall constitute the record in the case.

(c) Upon docketing of said case the Clerk of the Appellate Courts shall mail a copy of the report to the respondent, and shall issue a citation directing the respondent to file with the Clerk either (1) a statement that respondent does not wish to file exceptions to the report, findings, and recommendation, or (2) respondent's exceptions to the report. If respondent's address is unknown and a copy of said report and citation cannot be served upon said respondent, the matter shall stand sub-

mitted on the merits upon the filing of a certificate by the Clerk disclosing such facts.

(d) If the respondent fails to file exceptions to the report within twenty days after receipt thereof the Supreme Court shall fix a time and place for the imposition of discipline and the Clerk of the Appellate Courts shall notify the respondent by registered or certified mail of such time and place. The respondent shall appear in person and may be accompanied by counsel and make a statement with respect to the discipline to be imposed. Thereafter, the Supreme Court shall impose such discipline as may be deemed proper and just.

(e) If the respondent files exceptions the following steps shall be taken:

(1) The Clerk of the Appellate Courts shall immediately cause a transcript of the record of the proceedings before the panel to be prepared and filed and a copy to be served upon respondent. Such transcript shall be a part of the record and both the state and respondent may refer thereto in their respective briefs, setting forth with particularity the pages of transcript where the material referred to may be found.

(2) The respondent shall have thirty days from service of the transcript to file a brief.

(3) Upon the filing of respondent's brief, the Disciplinary Administrator or special prosecutor shall have thirty days in which to file a brief, and respondent shall have ten days after filing of the brief of the Disciplinary Administrator or the special prosecutor to file a reply brief. The briefs shall be of such number and form and be served

in such manner as is provided by the Rules relating to appeals in civil actions.

(4) If, after thirty days from the service of the transcript upon respondent, he fails to file a brief, he will be deemed to have conceded that the findings of fact made by the hearing panel are supported by the evidence.

(5) The matter shall be set for hearing and heard on the merits.

[History: Previously Rule No. 213, Am. effective January 8, 1979.]